United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1020

To be argued by
MARC MARMARO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1020

B/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

GERARDO SANCHEZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Gerardo Sanchez appeals from a judgment of conviction entered on December 20, 1976, following a guilty plea before the Honorable Henry F. Werker, United States District Judge in the Southern District of New York.

Indictment 75 Cr. 1095, filed on November 12, 1975, charged defendants Gerardo Sanchez, a/k/a "George Scott," a/k/a "Monguin," Luis Reyes, a/k/a "Gordo", Hector Echeverria, a/k/a "Liborio Morales", and Julio Fuentes with conspiracy to import cocaine into the United

States in violation of Title 21, United States Code, Sections 173 and 174.*

On November 1, 1976, Sanchez filed a petition for a writ of mandamus with this Court seeking review of adverse rulings of the District Court. On November 3, 1976, Sanchez moved this Court for a stay of his trial in the District Court, which was scheduled for November 8, 1976. Both applications were denied.

On November 9, 1976,** Sanchez, Reyes and Echeverria entered guilty pleas to separate superseding informations, each docketed as S. 75 Cr. 1095, which were filed on that date charging them with conspiring to distribute cocaine not in its original stamped package, in violation of Title 26, United States Code, Section 7237(a).***

On December 20, 1976, Judge Werker sentenced Sanchez, Reyes and Echeverria to five-year terms of imprisonment.****

Sanchez is presently serving his sentence.*****

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* On December 3, 1975, Superseding Information S. 75 Cr. 1175 was filed charging Julio Fuentes with conspiracy to distribute a narcotic drug which was not in its original stamped package. Fuentes entered a guilty plea to Information S. 75 Cr. 1175 on November 4, 1976 before Judge Werker and on December 13, 1976, received a two-year suspended sentence, two years probation and a $2500 fine.

** The trial date was postponed until November 9, 1976, because of illness of the trial judge.

*** Since Sanchez has neglected to include a copy of superseding Information S. 75 Cr. 1095 in his appendix, we are annexing a copy of the information to our brief.

**** Reyes' sentence was made concurrent to a sentence he was already serving.

***** On February 8, 1977 this Court (per Feinberg, Gurfein and Meskill, *J.J.*) denied Sanchez's motion for bail pending appeal.

Statement of Facts*

At the time of his plea, Sanchez admitted that in December 1970 he conspired with Echeverria, Luis Reyes and Julio Fuentes to import cocaine into the United States from Mexico. (A. 69-70).**

According to Sanchez's statement at the time of his guilty plea, the plot was hatched when he was approached by Echeverria in New York and asked to bring narcotics from Mexico into the United States. Sanchez said that he was afraid to do this but agreed to try to find someone else. Sanchez then spoke with Reyes in Miami, Florida, who introduced him to Julio Fuentes. (A. 64).

Sanchez and Echeverria then agreed that they would meet in Mexico City, and that Echeverria would give Sanchez an attache case with cocaine in it which Sanchez would pass along to Fuentes. (A. 64-65, 68-69). Sanchez subsequently received the attache case and $1,000 in cash from Echeverria in Mexico City. He then met with Fuentes and handed the same over to him. (A. 65-66, 68).

Fuentes called Sanchez and told him that there were problems with the transaction, and that he had secreted the cocaine in a hotel in Mexico. (A. 66-77). Echeverria,

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* Sanchez's brief contains a statement of facts that is submitted in flagrant violation of Rule 28(a)(3) and (e) of the Federal Rules of Appellate Procedure since there are no references to the appropriate place in the District Court record where the facts cited by Sanchez may be found. Indeed, it appears that the preponderance of Sanchez's "statement of facts" is not part of the District Court record.

** Citations to "A" refer to pages in Sanchez's appendix.

however, told Sanchez that Fuentes statement "sounded like a fairy tale" and that they should "go to Mexico and check it out. . . ." (A. 67).

Sanchez and Echeverria returned to Mexico and proceeded to the Hotel San Alberto in Hermosillo, where they were arrested. (A. 67-68).

Sanchez admitted that he knew that the attache case contained cocaine that had not been stamped in accordance with the Internal Revenue Code. (A. 69).*

ARGUMENT

POINT I

Sanchez Has Explicitly Waived His Right To Appeal.

Sanchez claims that even though he expressly waived his right to appeal, on the advice of counsel,** this Court should nonetheless hear his claims. In making this argument, Sanchez in essence asks this Court to ratify a charade in which he engaged before the District Court. This attempt should be rejected.

Sanchez was originally charged in Indictment 75 Cr. 1095 with conspiring to import cocaine into the United

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* At the time of Sanchez's aliocution, the Government indicated that had the case proceeded to trial, its proof would have demonstrated that Sanchez's participation in the conspiracy was more extensive than he had admitted. (A. 70).

** Sanchez is represented in this Court by the same law firm that represented him in the District Court. At no time has Sanchez contended that the advice he received from counsel was other than adequate.

States in violation of Title 21, United States Code, Sections 173 and 174.* A conviction under this Indictment would have subjected him to a mandatory minimum term of imprisonment of five years and a possible maximum of 20 years. After lengthy litigation of his pre-trial motions, all of which were denied by the District Court, Sanchez entered a guilty plea on the morning of trial to Superseding Information S. 75 Cr. 1095, which charged him with conspiring to distribute a narcotic drug which was not in its original stamped package, in violation of Title 26, United States Code, Section 7237(a). Pursuant to this law, the trial judge was permitted to impose a term of imprisonment of between two and ten years. However, unlike 21 U.S.C. §§ 173 and 174, 26 U.S.C. § 7237(a) permitted the district judge to suspend the imposition of sentence.

The night before the trial was scheduled to commence, Sanchez's counsel, James McGovern, Esq., asked Assistant United States Attorney Marc Marmaro whether the Government would consent to Sanchez's entering a guilty plea to a superseding information charging a violation of 26 U.S.C. § 7237(a) while still preserving for appeal the issues Sanchez had raised in connection with Indictment 75 Cr. 1095. Mr. Marmaro told Mr. McGovern that the Government would not consent to a preservation of appellate issues relating to the indictment unless Sanchez entered a guilty plea to the charge contained in the indictment.**

At the time of his plea, both the Court and the Government advised Sanchez that he was waiving his right

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* Those sections were repealed effective May 1, 1971, but explicitly apply to criminal acts that occurred prior to that date. See *United States* v. *Stassi*, 544 F.2d 579, 583 (2d Cir. 1976).

** The facts contained in this paragraph of the text are of necessity not part of the record below, because it was never anticipated by *any* party that Sanchez would appeal from his guilty plea.

to appeal, and, in the presence of counsel, Sanchez explicitly consented to such a waiver.*

Neither Sanchez nor his counsel informed either the Court or the Government that an appeal would be taken if Sanchez were dissatisfied with the sentence imposed by Judge Werker.**

In the face of the foregoing facts, Sanchez argues that "any waiver was hardly an intentional relinquish-

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* The following occurred during the course of Sanchez's allocution:

"The Court: Is there any question you would like to ask the Court about it?

Defendant Sanchez: Frankly, yes.

The Court: What is it?

Defendant Sanchez: Well, I am responsible—I honestly think that I am guilty but I honestly think my constitutional rights were violated, and in my mind they were.

The Court: I understand, but that has been resolved against you by the Court's decision.

Defendant Sanchez: That is the only——

The Court: You are talking about your speedy trial.

Defendant Sanchez: And my double jeopardy.

The Court: But those were both resolved against you by the Court's decision.

Defendant Sanchez: That was my only comment.

The Court: Yes.

[Assistant United States Attorney] Marmaro: Your Honor, it should be clear that the defendant is giving up all these rights by pleading to the superseding information, and that he will not take any further action with respect to those rights.

The Court: You have no right to appeal.

Defendant Sanchez: I am waiving it.

The Court: Yes; you understand that.

Defendant Sanchez: Yes." (A. 56-57).

** Sanchez's attorney first mentioned a desire to appeal from the conviction on the superseding information after Judge Werker imposed sentence. (A. 81). Obviously, had Sanchez stated at the time of his plea that he would appeal his conviction if he were dissatisfied with his sentence, the Government could have insisted that he either plead to the charge in the indictment or proceed to trial on that charge.

ment. Rather, it was improperly exacted from him and coercively obtained. Appellant wanted to retain his right to appeal." Brief at 12. This point is frivolous and is conclusively refuted by the record; Sanchez's appeal should be dismissed.

It is the settled law in this Circuit that a guilty plea waives all nonjurisdictional defects in the prior proceedings and that a defendant simply does not have the right to appeal pre-trial issues after a guilty plea without the consent of the Government and the District Court. *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975); *United States* v. *Doyle*, 348 F.2d 715, 718-19 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); *United States* v. *Mann*, 451 F.2d 346 (2d Cir. 1971) (per curiam).* In order to preserve his appellate rights, a defendant must at the time of his plea expressly preserve an appellate issue, and both the Court and the Government must consent. In *United States* v. *Burke*, *supra*, this Court noted that at the time of his guilty plea the defendant explicitly stated his intention to appeal the denial of his motions, and the District Court approved it. The Government was silent on this claim in the District Court (and did not contest appellate jurisdiction on appeal). The Court simply held that in view of the explicit expression of intent by the defendant and the judge, "it is up to the prosecutor to object if he wishes; otherwise silence on his part is sufficient assent." In so holding, however, the Court noted that if either the prosecutor or the Court had opposed the retention of appellate rights, the defendant's appeal would have been barred, relying on *United States* v. *Mann*, *supra*. *See* 517 F.2d at 379.

Thus, even if the record had been entirely silent on Sanchez's desire to appeal, he would be precluded from

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* Both *United States* v. *Doyle*, *supra*, and *United States* v. *Mann*, *supra*, dealt with waivers of speedy trial issues similar to the one raised by Sanchez.

doing so for failure of preserving the right and obtaining the consent (or at least the acquiescence) of the Court and the Government. In this case, however, the record reveals that the issue of appealability was indeed broached, and Sanchez explicitly waived that right. Thus, this case is even stronger than one involving an implicit waiver. *United States* v. *O'Donnell*, 539 F.2d 1233, 1237 n.2 (9th Cir.), *cert. denied*, 45 U.S.L.W. 3364 (U.S. Nov. 15, 1976).

Sanchez seeks to blunt the thrust of these decisions by arguing that the waiver rule should be re-examined in light of the Supreme Court's decisions in *Blackledge* v. *Perry*, 417 U.S. 21 (1974) and *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam). *Blackledge*, of course, preceded *United States* v. *Burke*, *supra*, and thus offers no ground for reexamination. At any rate, these decisions do not offer even the slightest support to three of the four substantive issues raised by Sanchez.* With respect to those three issues, the law is clear that a guilty plea itself precludes subsequent assertion of rights. *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *Brady* v. *United States*, 397 U.S. 742 (1970); *McMann* v. *Richardson*, 397 U.S. 759 (1970). *Blackledge* and *Menna* simply stand for the proposition that a guilty plea does not, in and of itself, constitute a waiver of an issue which, if sustained, would prevent a state from commencing a prosecution.** The

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* These are: (1) Sanchez's speedy trial claim, *see United States* v. *Doyle*, *supra*, (2) his due process claim and (3) the claim that the District Court improperly denied a hearing on the motion made by Echeverria, and joined in by Sanchez, that cocaine is improperly classified as a narcotic drug. Indeed, with respect to this last issue, Sanchez does not even contend that he had not waived this issue.

** In *Blackledge* v. *Perry*, *supra*, respondent claimed that North Carolina commenced a felony prosecution against him because he appealed a misdemeanor conviction arising out of the same facts as the felony charge. *Menna* v. *New York*, *supra*, dealt directly with a double jeopardy claim, holding that such a claim is not waived by a guilty plea and remanding the case to the state court for a determination of the merits of the claim.

Court, in effect, was equating certain issues with the jurisdiction of a court. *Cf. United States ex rel. DiGiangiemo* v. *Regan*, 528 F.2d 1262, 1268-69 (2d Cir. 1975), *cert. denied*, 426 U.S. 950 (1976). Consequently, in the case of all issues except that of double jeopardy, *Blackledge* v. *Perry*, *supra*, and *Menna* v. *New York*, *supra*, are not controlling. *See United States* v. *O'Donnell*, *supra*, 539 F.2d at 1236-37; *United States ex rel. DiGiangiemo* v. *Regan*, *supra*.

Moreover, the Court in *Menna* merely held that a guilty plea was not *itself* a waiver of a right to appeal a double jeopardy ruling; indeed, in a footnote, the Court noted that "waiver was not the basic ingredient" in the controlling line of cases. 423 U.S. at 62 n.2. Particularly since the Court in *Menna* specifically noted that double jeopardy claims may be waived,* 423 U.S. at 62-63 n.2; *see also United States* v. *O'Donnell*, *supra*, 539 F.2d at 1237 n.2 **; *Cf. United States* v. *Macklin*, 523 F.2d 193 (2d Cir. 1975), * * * the decision is wholly inapposite.

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* The cases are legion in which federal courts have held that double jeopardy claims can be waived. *See, e.g., United States* v. *Ewell*, 383 U.S. 116, 121 (1966); *United States* v. *Estremera*, 531 F.2d 1103 (2d Cir.), *cert. denied*, 425 U.S. 979 (1976).

** In *O'Donnell*, a case which post-dated *Menna*, the Ninth Circuit held that a guilty plea constituted a waiver of Sixth Amendment speedy trial rights and Fifth Amendment due process rights emanating from pre-indictment delay. The Court noted, however, that "even if a plea of guilty did not in and of itself waive a speedy trial defense, the defendant here specifically was asked to and did waive 'any defenses' that he might have to the charge in question. No such specific waiver was present in *Menna*." 539 F.2d at 1237 n.2.

*** In *Macklin*, the defendant was indicted by a grand jury whose term had been improperly extended. Therefore, the indictment to which Macklin plead guilty was a nullity. This Court held that the absence of an indictment was a jurisdictional defect which deprived the Government of its power to act, and this defect was not waived by a guilty plea.

[Footnote continued on following page]

Since Sanchez was well aware of the rights which he waived in pleading guilty and did so on the advice of competent counsel, he can hardly claim that his waiver was anything other than "an intentional relinquishment or abandonment of a known right or privilege. . . ." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Nonetheless, Sanchez contends that his waiver of appellate rights was somehow coerced because he was required to choose between proceeding to trial on a charge carrying a stiff punishment, or pleading guilty to a lesser charge and relinquishing his rights.* Sanchez's argument in this regard founders on both the law and the facts. This is simply not a case where the prosecutor has "upped the ante," *Blackledge* v. *Perry*, *supra*, 417 U.S. at 28, by increasing the penalties facing a defendant in order preclude an appeal, nor is there anything in the record demonstrating, or even allowing an inference of, vindictiveness. *Compare Blackledge* v. *Perry*, *supra*; *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). Indeed, at all times Sanchez had an untrammeled opportunity to exercise all his constitutional rights to go to trial on the original indictment facing him and to appeal any legal issues he wished to raise. Rather, the action of the prosecutor (and the District Court) reflected the quite natural and commonsensical concern that if Sanchez were to plead to an entirely new crime, embodied in an entirely

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In so holding the Court rejected the Government's argument that the defendant's plea was a *de facto* waiver of the right to an indictment, noting that such waivers must be made formally in open court. Implicit in this holding, therefore, was the conclusion that the requirement of a grand jury indictment can be waived. Certainly, if a defendant can waive his constitutional right to a grand jury indictment, without which the Government would be powerless to proceed against him, he may waive a double jeopardy claim.

* Interestingly, at the time of sentencing Sanchez rejected Judge Werker's offer to allow him to withdraw his plea of guilty. (A. 75-76).

different accusatory document, he would not nonetheless raise issues relating solely to the original indictment, which the Government would move to *nolle prosequi* upon entry of a final judgment.* (A. 59-60). Thus, when Sanchez states that "not until every remedy had been exhausted did appellant enter his plea—the only means left other than a trial for him to be in a position to assert that his rights were trespassed by the prosecution in the lower courts," Brief at 7-8, he is not only incorrect ** but irrelevant since his assertion of his rights related only to an indictment as to which, by common consent, the District Court will enter an order of *nolle prosequi* when the present judgment of conviction is final.

In short, Sanchez's assertion of appellate jurisdiction is frivolous.

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* The absurdity to which Sanchez's apparent logic would lead is clear if one were wildly hypothetical and assumed that he were to prevail on his claims that the prosecution of indictment 75 Cr. 1095 somehow deprived him of his constitutional or statutory rights. In that case, the most that he would be entitled to would be dismissal of that indictment. The functional equivalent of that relief will occur as soon as the judgment in this case is final. At any rate, even if the prosecutor's position had been illogical—which it was not—that would be irrelevant, since the prosecutor has an absolute right to bar a defendant from preserving issues for appeal. *United States* v. *Mann, supra; United States* v. *Doyle, supra;* see also *United States* v. *Spada,* 331 F.2d 995 (2d Cir.), *cert. denied,* 379 U.S. 865 (1964). Since Sanchez accepted this agreement with competent counsel to help him make "an intelligent assessment of the relative advantages" of doing so, *Brady* v. *United States, supra,* 397 U.S. at 748 n.6, his acceptance of the bargain is binding on him.

** Sanchez could have sought interlocutory review of the District Court's ruling on his double jeopardy claim. *United States* v. *Beckerman,* 516 F.2d 905 (2d Cir. 1975); *United States* v. *Alessi,* 536 F.2d 978 (2d Cir.), *cert. denied,* 45 U.S.L.W. 3364 (U.S. Nov. 15, 1976); *United States* v. *Alessi,* 544 F.2d 1139 (2d Cir. 1976).

POINT II

Sanchez Was Not Denied His Right To A Speedy Trial.

Even if one were to assume that Sanchez has not waived his right to a speedy trial by entering a guilty plea, his argument is nevertheless frivolous.

A. Sanchez did not become an accused in December 1970.

The central fallacy in Sanchez's reasoning on this point lies in his contention that he became an "accused" in December 1970. This claim flies completely in the face of the Supreme Court's decisions in *United States* v. *Marion*, 404 U.S. 307 (1971), and *Dillingham* v. *United States*, 423 U.S. 64 (1975) (per curiam), which held that the Sixth Amendment's guarantee of a speedy trial is activated only by a public governmental act in which an individual is accused of a crime and a prosecution is actually commenced. In *Marion*, the prosecution was held to commence when the defendants were indicted, notwithstanding the fact that the Government was aware of the underlying circumstances of the crime and the defendants' identities three years prior to the indictment, during which period the Government investigated the case. The Court made clear in *Dillingham* that the prosecution had commenced for Sixth Amendment purposes only when the Government announced to the community at large through the "public act" of arrest that it asserts there is probable cause to believe the defendant has committed a crime. 423 U.S. at 65.

The rationale behind both *Marion* and *Dillingham* is that the Sixth Amendment limits the amount of time

an individual is compelled to live under the cloud of a public accusation.*

Until the indictment in the instant case was filed, a prosecution by this Government had not commenced and an accusation had not been made. Sanchez, in effect, concedes as much when he states that he did not demand a speedy trial prior to the filing of the indictment because until that time he had no idea that he would be prosecuted in this country for his smuggling activities in December 1970. Brief at 18, 21.

Moreover, Sanchez concedes that he was arrested by Mexican officials for a violation of Mexican law, and that as a result of this arrest he was prosecuted by the Mexican Courts. Brief at 5-7. However, he asks this Court to hold that his Sixth Amendment rights attached at the time of this Mexican arrest simply because agents of the Bureau of Narcotics and Dangerous Drugs ("BNDD") who were investigating his smuggling activities in December 1970 supplied information to Mexican officials which led to his arrest and thereafter finger-

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* As Mr. Justice White put it in *Marion*:

"Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. . . . So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." 404 U.S. at 320.

printed and interviewed him while he was held in Mexico.

By no stretch of the imagination can the actions of the BNDD agents be construed as the commencement of an American prosecution or a public accusation by this Government. An examination of the facts surrounding Sanchez's arrest in Mexico demonstrates the frivolous nature of his claim.*

American narcotics agents learned on or about December 11, 1970, that cocaine was secreted in a hotel room in Hermosillo, Mexico. The agents notified Mexican authorities of the location of the cocaine. On December 12, 1970, Mexican officials seized the cocaine in the presence of American law enforcement officials. Thereafter, on December 17, 1970, the Mexican police notified an American narcotics agent that Sanchez and another individual were arrested in the Hotel San Alberto in Hermosillo, Mexico. There were no American officials present at the time of the arrest.** On December 18, 1970, a special agent of the BNDD who was stationed in Guardalajara, Mexico, was instructed to proceed to Hermosillo and obtain identifying information on the individuals who were arrested. The agent conferred with the arresting officers on December 22, and thereafter interviewed and fingerprinted the individuals, including Sanchez, on December 23.

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* The facts relating to the American involvement in Sanchez's arrest are contained in an affidavit sworn to by Assistant United States Attorney Daniel J. Beller, filed on April 14, 1976 (the "Beller Affidavit"). The affidavit was based on Mr. Beller's review of the Government's files in this case and included copies of case reports as attachments.

** Sanchez concedes this point in his brief. Brief at 5.

At no time did the United States Government lodge a detainer * or warrant against Sanchez with the Mexican authorities, and at no time prior to the filing of the indictment in this case was a complaint or other formal charge lodged against Sanchez in this country. *See Gravitt* v. *United States*, 523 F.2d 1211 (5th Cir. 1975).

Since Sanchez's arrest was by Mexican officials for a violation of Mexican law, Sanchez's Sixth Amendment speedy trial rights did not commence at that time. *See Gravitt* v. *United States*, *supra*; *United States* v. *Cordova*, 537 F.2d 1073, 1075 (9th Cir.) (per curiam), *cert. denied*, 45 U.S.L.W. 3364 (U.S. Nov. 15, 1976).** See

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* BNDD did, however, verbally request notification from Mexican officials of the time of Sanchez's release, and such notification was furnished. Beller Affidavit at ¶ 6.

** In *United States* v. *Gravitt*, *supra*, the defendant was arrested by Florida officers on a Georgia warrant charging armed robbery and assault. During the course of searching Gravitt they found weapons and ammunition which served as the basis of a later federal indictment. The Fifth Circuit held that the defendant's Sixth Amendment rights did not attach at the time of the arrest since the basis of the arrest was the state charge, and not the federal charge. 523 F.2d at 1215 n.6.

In *United States* v. *Cordova*, *supra*, the defendant was arrested by state authorities for a violation of state law. The state prosecution was thereafter dismissed for failure to comply with Arizona's speedy trial rules. The defendant was subsequently indicted by the Federal Government for a charge involving the same activities. The Ninth Circuit held that since the doctrine of dual sovereignty allowed both prosecutions, the state arrest did not trigger the defendant's speedy trial rights in the absence of a showing that "the state arrest and prosecution constituted 'a mere "temporary device" used to restrain appellant' until federal authorities might choose to prosecute." 537 F.2d at 1076.

As this Court noted in *United States* v. *Mejias*, Dkt. No. 76-1384, slip. op. 2269, 2283 (2d Cir., March 10, 1977) (*United States* v. *Cabral*, 475 F.2d 715, 718 (1st Cir. 1973), cited by Sanchez, is readily distinguishable since in *Cabral* the arresting officer told the defendant he was under arrest for the charge on which he was

[Footnote continued on following page]

generally, *United States* v. *Mejias*, Dkt. No. 76-1384, slip op. 2269 (2d Cir., March 10, 1977).

This case does not present a situation in which officials of one sovereign arrest an offender as an accomodation to a different sovereign. *Compare United States* v. *Cabral*, *supra*. Nor does it present a situation in which a sovereign arrests an individual on a charge which is later expanded upon. *See United States* v. *DeTienne*, 468 F.2d 151, 155 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973).* Rather, in this case a *bona fide* Mexican prosecution followed the Mexican arrest, and even though the BNDD received word that Sanchez had been released from Mexican custody after the conclusion of that prosecution, an American prosecution was not commenced at that time. Therefore, it cannot seriously be asserted that the arrest by Mexican officials triggered Sanchez's Sixth Amendment speedy trial rights.**

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ultimately prosecuted by the Federal Government—a charge which the state never pursued.

Likewise, *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976), is distinguishable since the two arrests involved in that case were by different branches of the same sovereign.

* In *United States* v. *DeTienne*, *supra*, 468 F.2d at 155, the Seventh Circuit stated:

> "It would be absurd in the extreme if an arrest on one charge triggered the Sixth Amendment's speedy trial protection as to prosecutions for any other chargeable offenses. Of course, if the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest and the different accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses."

** Sanchez does not contend that the pre-indictment delay violated his Fifth Amendment due process rights. However, even were he to make such a claim, it could not be sustained because he did not allege, either in the District Court or in this Court, that he suffered any specific prejudice as a result of the pre-indictment delay, or that the delay was a tactical choice of the Government. *United States* v. *Marion*, *supra*; *United States* v. *Mejias*, *supra*.

B. Sanchez's Speedy Trial Rights Were Not Violated by the Post-Indictment Delay.

Sanchez alternatively argues that even if his Sixth Amendment speedy trial rights attached at the time the indictment was filed, he was entitled to a dismissal of the indictment. This contention is meritless.

The indictment was filed on November 12, 1975, and trial was scheduled to commence on November 8, 1976. When the criteria established by the Supreme Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972), are applied to this case, it is clear that Sanchez's rights were not violated by the delay.

First, the length of the delay was not so unreasonable as to require the excessive relief of dismissal of an indictment. *See United States* v. *Mejias*, *supra*, slip op. at 2283 (21-month delay "not extraordinary"); *United States ex rel. Spina* v. *McQuillan*, 525 F.2d 813, (2d Cir. 1975) (26-month delay); *United States* v. *Lasker*, 481 F.2d 229, 237 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974) (two-year delay); *United States* v. *Infanti*, 474 F.2d 522, 527 (2d Cir. 1973) (28-month delay from arrest to trial). But *see United States* v. *Vispi*, 545 F.2d 328 (2d Cir. 1976).*

Second, the vast preponderance of the post-indictment delay was attributable to the defendants' voluminous pre-trial motions—indeed, Sanchez continued to make such motions (and request postponement) right up until the eve of trial.

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* *United States* v. *Vispi*, *supra*, presents a far more compelling case for relief than does the instant case. *Vispi* was a misdemeanor prosecution in which a 20-month delay between accusation and trial was preceded by a four year investigation. Moreover, the defendant was able to show actual prejudice.

Third, while Sanchez claims that he wanted a prompt trial and was ready to proceed to trial at all times after September 9, 1976, Brief at 22, his actions are hardly consistent with his contention. Not only did Sanchez file additional motions with the District Court well after September 9,* but during the week preceding the trial date he filed a petition for a wirt of mandamus with this Court and an application to stay the trial in the District Court pending this Court's decision on his petition. Understandably, in pressing this frivolous argument counsel neglects to mention these facts.

Finally, Sanchez has not alleged that he suffered any prejudice as a result of the post-indictment delay.

Consequently, this point is meritless.

C. The Court Properly Denied a Hearing on Sanchez's Speedy Trial Claims.

Sanchez's contention that Judge Werker should have held a hearing on his speedy trial claim is also meritless. The central facts with respect to these claims are not (and never were) in dispute. The Government conceded the participation of BNDD agents in the events surrounding Sanchez's arrest, and Sanchez conceded (1) that the arrest was made by the Mexican police, (2) that a Mexican prosecution ensued and (3) that he was not aware that he would be prosecuted by the United States until the indictment was filed. These facts alone are dispositive.

Moreover, the facts surrounding Sanchez's arrest in Mexico and the history of the case were placed before the

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* These were (1) a motion filed on November 3, 1976, seeking to dismiss the indictment on speedy trial grounds and (2) a request for an order to show cause, filed on November 7, 1976, seeking additional discovery.

District Court in the Beller Affidavit and a letter from Mr. Beller to Judge Werker, dated May 10, 1976. At no time did Sanchez submit an affidavit contesting the facts presented by the Government. Since Sanchez did not raise "detailed and controverted issues of fact," a hearing was not required. *United States* v. *Miranda*, 437 F.2d 1255, 1258 (2d Cir. 1971), *cert. denied*, 409 U.S. 874 (1972); *see also Michel* v. *United States*, 507 F.2d 461, 464 (2d Cir. 1974); *O'Neil* v. *United States*, 486 F.2d 1034, 1036 (2d Cir. 1973).

D. Sanchez's Due Process Rights Were Not Violated.

Sanchez argues that the institution of the prosecution against him amounted to a violation of the Due Process Clause. In support of this patently frivolous contention he directs this Court's attention to (1) the facts of the case as outlined in his brief, (2) his speedy trial arguments, (3) the prior Mexican prosecution, (4) Rule 48(b) of the Federal Rules of Crimial Procedure,* (5) speedy trial rules promulgated by this Court and by the District Court** and (6) a memorandum issued by then Attorney General William P. Rogers on April 5, 1959 (the "Rogers Memorandum").

In making this confused argument, Sanchez's basic complaint seems to be that if this Court were to reject all of his individual arguments it should nevertheless hold that collectively they amount to a violation of due

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* The present prosecution did not violate Rule 48(b), since that rule is only applicable after indictment. *See* discussion, *supra*, on Sanchez's speedy trial issue.

** During the time in question, the local speedy trial rules required merely the filing of a notice of readiness by the Government within six months of arrest, which was duly done in this case. While a requirement of actual commencement of trial within 180 days of arraignment went into effect on July 1, 1976, see 18 U.S.C. § 3161 *et seq.*, that provision was also met.

process. If for no other reason, this argument should be rejected because it was not raised in the District Court. *United States* v. *Christopher*, 546 F.2d 496, 497 (2d Cir. 1976) (per curiam).

However, even reaching the merits of this claim, it is obviously frivolous.

The only point raised here that is not raised elsewhere is that this prosecution was instituted in violation of a Department of Justice policy outlined in the Rogers Memorandum. This memorandum required that the United States Attorney obtain the approval of an Assistant Attorney General prior to instituting a federal prosecution for the same activities that had served as the basis for a previous state prosecution.

The simple answer to this point is that since the Rogers Memorandum has not been promulgated as a Justice Department regulation and has not been published in the Federal Register, even if the procedure prescribed by the memorandum were not followed it could not be the basis for reversing an otherwise valid conviction. *See Sullivan* v. *United States*, 348 U.S. 170, 173 (1954); *United States* v. *Hutul*, 416 F.2d 607, 626-27 (7th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970).

Even assuming, however, that the policy announced in the Rogers Memorandum has the force of law, institution of this prosecution did not violate this policy for two reasons. First, the memorandum is aimed at a federal prosecution following a state prosecution and thus is inapplicable to this case. Second, the antecedent foreign prosecution in this case was for possession of narcotics, while the federal prosecution was for conspiracy. Moreover, prior to trial the Department of Justice informed defense counsel that the Rogers Memorandum did not

apply to this case, thus obviously obviating any need for compliance.*

Again, Sanchez's brief does not mention this point. This claim is frivolous.

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* The following letter was sent to Sanchez's counsel:

"October 6, 1976

Thomas H. O'Rourke, Esquire
299 Broadway
New York, New York 10007

Re: *United States* v. *Gerardo Sanchez, et al.*
75 CR 1095, Southern District, New York

Dear Mr. O'Rourke:

Reference is made to your letter of August 27, 1976, in which you refer to the Department's *Petite* policy and assume its implication in the case now pending against your client, Gerardo Sanchez, in the Southern District of New York.

The *Petite* policy does not apply in this case, accordingly, no recommendation was submitted to the Department by the United States Attorney.

Assistant United States Attorney John P. Flannery informs us that your client was convicted in Mexico for possession of cocaine. He is now being prosecuted in the United States for conspiracy to violate the narcotic laws of the United States. There is no substantive cocaine possession count in the indictment, and the Mexican cocaine possession incident is only one of many overt acts alleged to have been carried out in furtherance of the conspiracy in which your client and his co-defendants are alleged to have been participating. Conspiracy is an entirely separate offense from possession.

Furthermore, the *Petite* policy addresses the problems arising out of concurrent federal and state criminal jurisdiction and among various federal districts. There is no treatment of the subject of foreign prosecution in the April, 1959, press release of Attorney General Rogers.

The *Petite* policy is simply not invoked by the subject case.

Sincerely,

KURT W. MUELLENBERG, Chief
Narcotic and Dangerous Drug Section
Criminal Division
By: Stephen L. Harwood
Attorney"

POINT III

Assuming *Arguenao* That Sanchez Has Not Waived His Double Jeopardy Claim, This Claim Is Meritless.

Sanchez contends that had the present case proceeded to trial he would have been placed in jeopardy twice for the same offense. As Sanchez recognizes, acceptance of this argument would be contrary to settled Supreme Court precedent.

The law is clear that two sovereigns may separately punish an individual for the same criminal acts without violating the Double Jeopardy Clause. *See Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *United States* v. *Lanza*, 260 U.S. 371 (1922); *United States* v. *Mejias*, *supra*, slip op. at 2281. Moreover, it is equally clear that a conspiracy to violate the law and a substantive violation of the law are separate and distinct crimes for purposes of the Double Jeopardy Clause. *See, e.g., Sealfon* v. *United States*, 332 U.S. 575 (1948).** *See also United States* v. *Cheung*,

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* Sanchez has not cited a single case which sheds the slightest doubt on the continued vitality the concept of dual sovereignty. Mr. Justice Brennan, concurring in *Ashe* v. *Swenson*, 397 U.S. 436, 448 (1970), merely opined that in deciding whether successive prosecutions by the same sovereign violated a defendant's double jeopardy rights, the "same transaction" test should be used instead of the "same evidence" test. In *Waller* v. *Florida*, 397 U.S. 387 (1970), the Court merely stated that a state and a political subdivision thereof were not separate sovereigns. In addition, this Court has recently rejected a similar invitation to disregard the dual sovereignty doctrine. *United States* v. *Mejias*, *supra*, slip. op. at 2281.

** Indeed it is clear from a reading of the Information and of Sanchez's guilty plea allocution, that the crime to which Sanchez entered a guilty plea had been completed prior to the

[Footnote continued on following page]

Dkt. No. 76-1362, slip op. 2063, 2065-66 (2d Cir., Feb. 28, 1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 791-92 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3601 (U.S. March 7, 1977), and numerous cases there cited.

Since Sanchez's Mexican prosecution was for possession of cocaine, *see* Brief at 27 n.5, and his present conviction was for conspiracy to distribute a narcotic drug that was not in its original stamped package, in violation of the federal tax laws, the foregoing principles of law demonstrate the frivolous nature of Sanchez's argument.* Judge Werker was clearly correct in denying this claim without a hearing.

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time Sanchez set foot in Mexico. Consequently, the evidence which was required to support a conviction in the instant case would not have been sufficient to warrant a conviction for possession of the cocaine in Mexico. *See, e.g., United States* v. *Papa*, 533 F.2d 815, 820 (2d Cir. 1976); *United States* v. *Bommarito*, 524 F.2d 140, 146 (2d Cir. 1975); *United States* v. *Mallah*, 503 F.2d 971, 985 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975).

* Nothing in the Single Convention on Narcotic Drugs infringes in any way on the power of the Government to proceed in the instant case. Indeed, Article 36(2) states: "Subject to the constitutional limitations of a party, its legal system and domestic law, (a)(i) Each of the offenses enumerated in paragraph 1, if committed in different countries, shall be considered as a distinct offence..."

Paragraph 4 of Article 36 further states: "Nothing contained in this article shall affect the principle that the offenses to which it refers shall be defined, prosecuted and furnished in conformity with the domestic law of a Party."

18 United States Treaties and Other International Agreements 1409, 1425-26.

POINT IV

Cocaine Was Not Misclassified As A Narcotic Drug.

Even assuming *arguendo* that the issue of a constitutional violation because of claimed misclassification of cocaine has not been waived by Sanchez's guilty plea, it should nevertheless be denied as frivolous by this Court.

First, Sanchez directs his attack towards the wrong statute.* Neither Sanchez nor any co-defendant claimed in the District Court that cocaine was misclassified as a narcotic drug for purpose of the Internal Revenue Code violation to which they pleaded guilty. Title 26, United States Code, Section 7237(a); *see also* 26 U.S.C. § 4731. Consequently, this Court cannot consider this claim. *See United States* v. *Christopher, supra.*

Moreover, Sanchez has certainly not met his heavy burden of showing that Congress' determination that cocaine should be classified as a narcotic drug for purposes of the imposition of a transfer tax is irrational. *See United States* v. *Kiffer*, 477 F.2d 349 (2d Cir. 1973); *United States* v. *Smaldone*, 484 F.2d 311, 319-20 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *United States* v. *Marshall*, 532 F.2d 1279, 1287-88 (9th Cir. 1976); *United States* v. *Harper*, 530 F.2d 828 (9th Cir. 1976) (per curiam); *United States* v. *Castro*, 401 F.

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* Sanchez's claim is that cocaine was misclassified as a narcotic drug under 21 U.S.C. § 802(16)(B). However, this section is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, 84 Stat. 1236, which was not the statute involved in this case.

The definition of narcotic drug contained in § 802(16)(B) is, however, almost precisely the same as the definition contained in 26 U.S.C. § 4731.

Supp. 120 (N.D. Ill. 1975); *United States* v. *Amidzich*, 396 F. Supp. 1140 (E.D. Wisc. 1975); *United States* v. *Hobbs*, 392 F. Supp. 444 (D. Mass. 1975); *United States* v. *Miller*, 387 F. Supp. 1097 (D. Conn. 1975); *United States* v. *Brookins*, 383 F. Supp. 1212 (D.N.J. 1974), *aff'd*, 524 F.2d 1404 (3d Cir. 1975).*

Consequently, this point is meritless.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MARC MARMARO,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

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* In addition, the Single Convention on Narcotic Drugs obligates all signatories to control the manufacture, trade and distribution of certain drugs, including, cocaine. While 26 U.S.C. § 4731 (pursuant to which cocaine is defined as a narcotic drug) predates this treaty, the requirement that transfers of cocaine be in a stamped package is a method by which this Government's obligation under that treaty is carried out. As such, the classification of cocaine is constitutional. *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920); *United States* v. *Rodriquez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972).

APPENDIX

Information

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(S) 75 Cr. 1095

UNITED STATES OF AMERICA,

—v.—

GERARDO SANCHEZ,

Defendant.

The United States Attorney charges:

1. From on or about the 1st day of December, 1970, and continuously thereafter up to and including December 30, 1970, in the Southern District of New York and elsewhere, GERARDO SANCHEZ, the defendant, and Luis Reyes, a/k/a "Gordo", Hector Echeverria, a/k/a Liborio Morales and Julio Fuentes named herein as co-conspirators but not as defendants, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together with and with each other to violate Sections 4701, 4703, 4704(a) and 4771(a) of Title 26 United States Code.

2. It was part of said conspiracy that the said defendant and co-conspirators unlawfully, wilfully and knowingly would purchase, sell, dispense and distribute a narcotic drug, to wit, cocaine, the exact amount thereof to the United States Attorney unknown, said narcotic drug not being in the original stamped package, and not from the original stamped package, in violation of Section 4701, 4703, 4704(a) and 4771(a) of Title 26, United States Code.

Information

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about December 2, 1970 GERARDO SANCHEZ and Luis Reyes met with Roniel Medina and Julio Fuentes in an apartment in Miami, Florida.

2. On or about December 4, 1970, at approximately 12:50 A.M., Julio Fuentes flew from Miami, Florida to Los Angeles, California.

3. On or about December 5, 1970, Luis Reyes flew from Miami, Florida to New York, New York.

4. On or about December 6, 1970, Julio Fuentes registered at the Hotel Del Prado in Mexico City, Mexico.

5. On or about December 7, 1970, GERARDO SANCHEZ handed an attache case with approximately six and one-half (6½) kilograms of cocaine to Julio Fuentes at the Romano Cafeteria in Mexico City, Mexico.

6. On or about December 7, 1970, GERARDO SANCHEZ told Julio Fuentes to travel to Hermosillo, Mexico, leave the attache case in a hotel room, travel to San Diego, California and meet there with Luis Reyes and Roniel Medina, return with them to Hermosillo, Mexico, pick up the cocaine and deliver it to New York City.

7. On or about December 8, 1970, Julio Fuentes flew from Mexico City, Mexico to Hermosillo, Mexico.

8. On or about December 8, 1970, Julio Fuentes secreted an attache case with approximately six and

one-half kilograms of cocaine in room 207, Hotel San Alberto, Hermosillo, Mexico.

9. On or about December 8, 1970, Luis Reyes, while in Fort Lee, New Jersey, had a telephone conversation with Roniel Medina, who was in Miami, Florida.

10. On or about December 9, 1970, Julio Fuentes registered at the Holiday Inn Hotel, First and Cedar, San Diego, California.

11. On or about December 9, 1970, Luis Reyes met with Roniel Medina in New York, New York.

12. On or about December 10, 1970, Luis Reyes and Roniel Medina flew from New York, New York to Los Angeles, California.

13. On or about December 10, 1970, while en route from New York to Los Angeles, Luis Reyes told Roniel Medina that the cocaine which they would pick up belonged to Hector Echeverria.

14. On or about December 10, 1970, Luis Reyes and Roniel Medina flew from Los Angeles, California, to San Diego, California.

15. On or about December 10, 1970, Luis Reyes and Roniel Medina registered at the Holiday Inn Hotel, First and Cedar, San Diego, California.

16. On or about December 10, 1970, Luis Reyes told Roniel Medina that he had observed an agent of the Bureau of Narcotics and Dangerous Drugs following him.

17. On or about December 11, 1970, Luis Reyes met with Roniel Medina and Julio Fuentes at the Holiday Inn Hotel, First and Cedar, San Diego, California.

Information

18. On or about December 11, 1970, Luis Reyes flew from California to New York, New York.

19. On or about December 11, 1970, Julio Fuentes and Roniel Medina travelled by car to Tucson, Arizona.

20. On or about December 12, 1970, GERARDO SANCHEZ, who was then in New York, New York, had a telephone conversation with Julio Fuentes, who was then in Tucson, Arizona.

21. On or about December 13, 1970, GERARDO SANCHEZ, who was then in New York, New York, had a telephone conversation with Julio Fuentes, who was then in Tucson, Arizona.

22. On or about December 14, 1970, GERARDO SANCHEZ, who was then in New York, New York, had a telephone conversation with Julio Fuentes and Roniel Medina, both of whom were then in Tucson, Arizona.

23. On or about December 15, 1970, GERARDO SANCHEZ, who was then in New York, New York, had a telephone conversation with Julio Fuentes, who was then in Tucson, Arizona.

24. On or about December 16, 1970, GERARDO SANCHEZ, travelling under the name of George Scott, and Hector Echeverria, travelling under the name of Liborio Morales, went from New York, New York, to Tucson, Arizona and from there to Hermosillo, Mexico.

25. On or about December 16, 1970, GERARDO SANCHEZ and Hector Echeverria went to room 207 at the Hotel San Alberto in Hermosillo, Mexico, where the cocaine had been stashed.

Information

26. On or about December 29, 1970, Luis Reyes told Roniel Medina that he hoped to hear from GERARDO SANCHEZ'S contact for narcotics in fifteen to twenty days.

(Title 26, United States Code, Section 7237(a).).

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ROBERT B. FISKE, JR.
United States Attorney

★ U. S. Government Printing Office 1977— 714-017-560

AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

MARC MARMARO, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 17th day of March , 197 he served a copy of the within
2 copies
by placing the same in a properly postpaid franked envelope addressed:

Ronald D. Degen, Esq.
O'Rourke, McGovern & Degen
233 Broadway
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Marc Marmaro
MARC MARMARO

Sworn to before me this
17th day of March, 1977

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1341775
Qualified in Kings County
Commission Expires March 30, 1977